Insight

West Virginia v. EPA and the Future of Net Neutrality

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Executive Summary

- The Supreme Court's decision in *West Virginia v. Environmental Protection Agency* strengthened the major questions doctrine, limiting deference reviewing courts will give to agencies on questions of major economic or political significance without clear authority from Congress.
- The ruling could impact the Federal Communications Commission (FCC), which will likely pursue a net neutrality rulemaking to reclassify broadband as a common carrier if the Senate confirms a fifth FCC commissioner.
- Network neutrality regulation that treats broadband Internet access service as a common carrier raises the exact types of economic and political issues on which the Court focused in *West Virginia*, meaning a future net neutrality rulemaking at the FCC could be in jeopardy.
- If Congress wants to regulate broadband as a common carrier, it may need to either clearly grant the FCC the authority to make such classification or design a new regulatory regime for broadband.

Introduction

The Supreme Court's implementation of the major questions doctrine in *West Virginia v. Environmental Protection Agency* has sent shockwaves through the administrative state, as the decision will likely limit agency rulemaking and actions moving forward. For years, agency interpretations of their governing statutes generally received deference from courts. The Supreme Court's decision in *West Virginia* doesn't change the deference analysis, but now when agency rules address questions of major political or economic significance, the

agency must point to clear congressional delegation of authority before courts defer to its interpretation.

In the telecommunications world, the *West Virginia* decision will undoubtedly impact future Federal Communications Commission (FCC) network neutrality rules, which would treat broadband providers as common carriers. For years, calls to impose common carriage rules by reclassifying broadband as a utility service have sparked significant disagreement on and political interest in a relatively mundane question of telecommunications law. The *West Virginia* decision could finally resolve these tensions by requiring Congress to act if it wants to impose a utility-style regime of broadband networks.

Some scholars have suggested the decision will have minimal impact on the FCC's authority to reclassify broadband and impose strict network neutrality regulations, but this view ignores the significant impact such a change would have. Completely upending the regulatory regime for broadband Internet would drastically change the business of broadband, and would have a major societal and economic impact as providers lose incentive to deploy, maintain, and upgrade networks. With such a significant impact and a lack of clear authority granted from Congress to radically change the regulatory regime for broadband, courts will likely not defer to the agency's interpretation of the statute, spelling doom for any reclassification effort.

If Congress wants to impose network neutrality regulations on broadband providers, it can. But for years it has chosen not to do so, creating an environment of uncertainty as the FCC continues to revisit the question. The *West Virginia* case may finally end this constant back and forth.

Major Questions Doctrine

Courts have a long history of deferring to agency interpretations of statutes within their jurisdiction, primarily under the theory that agencies have expertise in their fields and need the flexibility to enforce federal legislation. *Chevron U.S.A. v. Natural Resources Defense Council* established a two-pronged analysis for deference questions: 1. Has Congress directly spoken to the precise question at issue? and 2. Was the agency's interpretation of that statute permissible? *Chevron* is well-established administrative law, but there has been a long-growing skepticism of the sort of deference it asked reviewing courts to provide, especially in the context of agency interpretations of their own authority. A so-called *Chevron* Step Zero first requires courts to examine whether the *Chevron* framework applies at all: If the agency's interpretation of statute was not derived from its authority to make binding law, courts should not defer to the agency. In practice, that meant courts would not defer to agencies when at issue were non-binding policies, such as policy guidelines and

declaratory rulings.

In *West Virginia*, the Court added a further "step zero." As the Court explained with regard to agency rulemakings, there are extraordinary cases in which the history and breadth of the authority asserted, as well as the economic or political significance of that assertion, provide reason to hesitate before concluding that Congress meant to confer such authority. While there is no bright-line rule, different factors can help inform whether an issue has political or economic significance, such as the amount of money involved, overall impact on the economy, the number of people affected, and the attention on the issue from Congress and the public. In these cases, the normal *Chevron* framework will apply provided the agency can point to clear congressional authorization to regulate in that manner.

Building on this core framework, the Supreme Court provides examples of the types of issues that could give rise to a major question. First, did the agency claim to discover in a long-extant statute an unheralded power representing a transformative expansion of its regulatory authority? Second, was that newfound power in the vague language of an ancillary provision of the agency's statute that had rarely been used in preceding decades? Third, did the agency's discovery allow it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact? These three prongs paint a much clearer picture of the type of regulatory overreach the Court was worried about: an agency stretching the bounds of its authority to claim entirely new jurisdiction or regulatory power that Congress clearly didn't intend to include in the governing statute.

This standard may appear similar to the first step of *Chevron* (whether Congress directly spoke to the precise issue), but the distinction matters. In the first step of the *Chevron* analysis, courts look for ambiguity in the statute. In these cases, Congress clearly expects the agency to implement a statute, but the agency only receives deference if the language is ambiguous. As Justice Gorsuch explained in *SAS Institute v. Iancu*, "courts 'owe an agency's interpretation of the law no deference unless, after employing traditional tools of statutory construction,' they find themselves 'unable to discern Congress's meaning.'" The major questions doctrine holds that before courts examine whether the statute has ambiguous language that an agency may interpret, they must look at whether Congress delegated to administrative agencies authority to resolve questions of economic or political significance. In practice, regardless of whether a statute is ambiguous, if the specific rule in question has a significant economic and political impact and the agency significantly departs from precedent using ancillary provisions in the statute, courts must find a clear delegation of authority for the agency to resolve that question.

The major questions doctrine essentially states that if an agency is attempting to dramatically expand the bounds of its authority to issue a policy change that will have major

economic or political significance, courts must first find that Congress clearly intended to delegate to the agency that authority.

Net Neutrality Rules and Title II Classification

The major questions doctrine will likely become a major component of the legal case around future network neutrality regulation at the FCC. At the outset, it is important to separate network neutrality regulations from the broader question of the classification of broadband Internet access service under the Communications Act.

Network neutrality refers to the concept that Internet users should be free to access the content and services of their choosing, and that traffic-management or interconnection practices that discriminate unfairly among edge services should be prohibited. The FCC has dealt with these challenges for years, dating back to when the agency challenged broadband providers to preserve the four "Internet Freedoms." When the FCC tried to implement network neutrality regulations that would impose disclosure, anti-blocking, and anti-discrimination requirements, the DC Circuit held in *Verizon v. Federal Communications Commission* that while the agency has general authority to enact measures governing treatment of Internet traffic that promote the deployment of broadband infrastructure, it may not impose requirements that treat broadband providers as common carriers. This left the FCC with two options: tailor network neutrality rules in a way that didn't treat broadband providers as common carriers or reclassify broadband as a Title II Telecommunications Service and thus subject it to the statutory utility-style regulations therein.

The FCC chose the latter in 2015, but in 2017 reversed course to reclassify broadband as a Title I service, while keeping some transparency requirements. As a result, the major debate has moved past network neutrality as a concept and has instead focused more on the question of classification. If the FCC reclassifies broadband as a Title II service, it can not only impose much stricter network neutrality regulations but also apply the provisions of Title II, such as rate regulation or privacy requirements.

Is Broadband Classification a Major Question?

West Virginia makes a significant statement against the expansion of agency authority without guidance from Congress. Whether the FCC has regulatory authority to impose common-carrier-style regulation on broadband service has sparked many of these same concerns. By shifting away from a market-based regulatory regime endorsed by Congress to a utility-style regime designed for utility telephone networks, reviewing courts may find that the agency's interpretation should not receive deference.

Economic or Political Significance

The major questions doctrine begins with a basic threshold question: Does the regulation in question deal with an issue of major economic or political significance? Subjecting broadband providers to Title II, utility-style regulations clearly does both.

Regarding economic significance, in *West Virginia*, the Court explained that the EPA's rule would "substantially restructure the American energy market," a major economic impact, by limiting the number of coal plants that could operate. This would fundamentally restructure the United States' energy market. As the Court explains, "We also find it 'highly unlikely' that Congress would leave to 'agency discretion' the decision of how much coal-based generation there should be over the coming decades" when Congress simply gave the EPA the authority to mandate emission reduction technologies that wouldn't fundamentally change the nature of energy production. While the decision focused primarily on the radical departure from existing policy, the majority clearly saw the shifting of energy production sources through an economic lens.

Treatment of broadband providers as common carriers would allow the FCC to impose a variety of utility-style regulations, such as price controls and privacy standards. These regulations would lower potential revenue, and as potential revenue decreases, broadband providers would likewise have less incentive to invest in expanding and improving coverage for their users. A study from the Phoenix Center found that the threat of reclassification alone lowered investment by around $32-40 billion annually, with the total cost of the FCC reclassification in 2015 amounting to about a year's worth of total investment.

These numbers paint a bleak picture for applications that rely on the high-speed connectivity that broadband provides. Services such as 4K video and Zoom calling need significant bandwidth, and real-time applications, such as online gaming, often require very low latency to ensure that lag from the signal origin to the signal receipt does not limit the functionality of the application. Network reliability can also be the difference between life and death, and if broadband providers lack a financial incentive to continually expand coverage and improve the quality of their services, public safety applications may not run as smoothly as they otherwise would. Without investment in broadband, all sectors of the economy will suffer.

Network neutrality rules and broadband classification also have major political significance. Comedian John Oliver's 2014 segment on the FCC's Title I approach to net neutrality spurred an unprecedented influx of comments and attention from a general public worried that a lack of Title II classification would allow Internet service providers to create "fast and slow lanes." This notion evoked such public anger that Republican FCC commissioners

received death threats when reclassifying broadband in 2017, and the vote on the item was delayed due to a bomb threat at the FCC.

Do the Additional Factors Suggest Network Neutrality Is a Major Question?

Despite this general threshold analysis primarily cited by Justice Kavanaugh in his dissent in *United States Telecom Association v. Federal Communications Commission*, Justice Roberts examined other factors as well such as a whether the EPA's rule would use a long extant statute to dramatically expand the agency's regulatory authority or whether Congress specifically declined to adopt such an approach to find that the rule presented a major questions case. Courts will likewise find that broadband reclassification and common-carriage style network neutrality rules present a major question case.

First, in *West Virginia*, the Court primarily focused on the transformative expansion of its regulatory authority in a long extant statute. The Court explained that Congress empowered the EPA to consider emission-reducing technologies, but it did not grant the EPA broad authority to determine which types of power sources generators could use. The statute had never been used in such a way and was a major departure from existing interpretations.

Likewise, Title II of the Communications Act was designed to regulate public switched telephone network (legacy telephone networks) in which individual companies had inherent monopolies on the local telephone service. While early Internet connections originally operated over telephone networks, broadband networks quickly moved beyond this model and providers developed their own rival networks. The treatment of broadband providers as common carriers would ignore this history by interpreting the definition of telecommunications services beyond what Congress could have possibly intended when defining the term. Worse, as an amicus brief by Techfreedom has explained, reclassifying broadband as a Title II service "opens the door for the FCC to impose common carriage regulation on any services that connect to the Internet using public IP addresses" such as "VoIP services that do not interconnect with the telephone network" and "equivalent voice chat function built into other services, such as real-time, multiplayer gaming."

Classification of broadband as a Title II service would not only fundamentally shift the regulation of broadband in the country, but also justify the regulation using authority in a classification designed for telephone networks.

Second, to justify the regulation at issue in *West Virginia*, the EPA found authority for its rulemaking in an ancillary provision that had rarely been used in the preceding decades. Even for services that use the telephone networks, the FCC rarely uses its authority to reclassify services under Title II, with Congress creating an entirely new regulatory regime

in the Communications Act for mobile service. While the FCC can and often does classify new services and technologies, it rarely classifies a new service as a Title II service without some connection to the telephone networks. Nevertheless, the FCC discovered that it could simply stretch the definition of telecommunications service to include broadband providers, despite never making such an expansive reading of the statute in the past.

Proponents of reclassification will likely argue that this factor cuts against the finding of a major question because determining whether a service is a telecommunications service is the type of task Congress envisioned for the FCC. Yet that authority should be viewed in the context of its origin: utility telephony. For example, when Congress created rules for commercial mobile radio service, it limited interconnected services to those that interconnected with the telephone networks. Absent operation over telephone networks, there are very few limiting principles in the definition that wouldn't allow the agency to find unheralded power, and therefore a reviewing court may be very skeptical of broad interpretative authority.

Finally, just as Chief Justice Roberts could not ignore that Congress considered and rejected multiple times the type of regulatory authority the EPA newly uncovered, we cannot ignore the conspicuous congressional inaction on the issue of broadband classification. In the EPA's case, Congress consistently rejected proposals to amend the Clean Air Act to create such a program or similar measures such as a carbon tax. Similarly, Congress has repeatedly rejected calls to reinstate the 2015 Open Internet Order or reclassify broadband as a Title II service. Further, specific legislation to impose network neutrality regulations, even outside of the Title II context, has repeatedly failed despite some bipartisan support for such an approach. If Congress believes broadband should be regulated like utility telephony, it can choose to reclassify broadband as a matter of law. It hasn't done that, and thus agency action to reclassify broadband would ignore congressional intent.

Did Congress Clearly Authorize the FCC to Regulate Broadband as a Common Carrier?

Assuming a reviewing court determines broadband classification and/or net neutrality rules present a major question, the FCC could still receive deference if it can point to "clear congressional authorization" to regulate in that manner.

In *West Virginia*, the Court explicitly rejected a broad reading of "application of the best emission reduction… adequately demonstrated," in part because reading into the statute things that aren't there could allow the agency to consider almost any rulemaking, no matter how tenuous its authority to do so. As the Court explains, "just because a cap-and-trade 'system' can be used to reduce emissions does not mean that it is the kind of system of

emission reduction referred to….” Similarly, the FCC can attempt to point to its general authority over telecommunications services to support its conclusion that it can regulate broadband as a common carrier, but this ignores that Congress designed Title II for telephony and services that use the telephone network to deliver voice communications. Congress did not expect the FCC to start qualifying every new technology as a telecommunications service. It designed the regime for monopoly telephone loops.

Further, when Congress makes clear its intent in other areas that contradict the reading, there is reason to believe Congress didn’t intend to give the agency authority to interpret the provisions in the way it has. *West Virginia* highlights that Congress went “out of its way” to amend the statute to allow states to meet standards through a cap-and-trade system but “not a peep was heard from Congress about the possibility a trading regime could be installed under §111.” In other words, Congress clearly considered the possibility but chose not to grant the EPA that authority. Likewise, Congress considered the FCC’s role in promoting broadband deployment in Section 706(b), but the statute directs the agency only to determine whether advanced telecommunications capabilities were being deployed, and if not, use pro-market policies to spur deployment. If Congress meant to regulate broadband as a utility, it wouldn’t limit the FCC’s response to incentivize broadband deployment through removing barriers and promoting competition. Further, Congress has been explicit in the past when regulating broadband such as when it required broadband mapping or the deployment of broadband infrastructure. If Congress wanted a more rigid regime at the FCC, it could have explicitly said so. Failing to impose such a regime suggests the authority granted to the FCC relates directly to telephone networks, not any new communications technology that goes beyond the simple delivery of signals.

This logic also dooms the reliance of pro-reclassification advocates on *National Cable & Telecommunications Association v. Brand X*. In this case, the Court reviewed a decision from the FCC to classify cable broadband as a Title I service after a lower circuit court had held the opposite. But the lower court relied on a previous court decision that determined cable broadband was a Title II service, and therefore held to the court’s previous decision rather than the agency’s interpretation. Justice Thomas explained that Congress did delegate to the FCC broad authority to prescribe rules and regulations as may be necessary, and therefore it could receive *Chevron* deference for its decision to classify broadband as a Title I service. But the decision not to consider cable broadband as a telecommunication service stemmed from its difference from the type of voice telephony Title II was meant to regulate and falls very much in line with the type of market-based approach to broadband that Congress seemingly envisioned when passing Section 706. Post *West Virginia*, reviewing courts will likely point to the lack of clear delegation of authority over broadband to require further congressional action before the FCC can regulate broadband as a common carrier.

Will a Majority of Justices Find That Net Neutrality Regulation Presents a Major Question?

Ultimately, whether the Court decides to defer to the FCC will largely depend on the number of votes for finding that net neutrality regulation presents a major question, and therefore two key questions emerge: 1. Will the views of Justice Kavanaugh and Justice Roberts on the major questions doctrine overlap? and 2. Will Justice Thomas' recent views on common carriage regarding "big tech" contradict a finding that broadband shouldn't be regulated as a common carrier?

On the first question, the views of Justice Kavanaugh and Justice Roberts on the major questions doctrine differ to some extent. Kavanaugh sees the doctrine as fairly broad, and hinges his analysis largely in the terms "economic and social significance." Meanwhile, *West Virginia*, which lays out the Court's position, spends more time examining how the rule drastically departs from existing regulation and how the agency can find expansive power in seemingly innocuous provisions. Both perspectives will focus equally on the FCC's regulatory expansion into utility-style broadband regulation. Kavanaugh clearly sees common carriage as the type of regulation that would have major economic significance, and Roberts would likely agree. But when Roberts goes through these other considerations, he may likely find the radical departure from the current regulatory regime and congressional intent fits squarely into the fact pattern of *West Virginia*. The question isn't whether both justices would find common carrier regulation of broadband a major question that does not warrant agency deference, but rather how a majority opinion would weigh the respective criteria, as this could either expand or limit the application of major questions doctrine moving forward.

Those who don't think *West Virginia* spells doom for net neutrality rules at the FCC also point to Justice Thomas' willingness to treat applications that run over broadband networks such as Facebook and Twitter as common carriers. While this could appear to be a roadblock, it is important to understand the distinction between a legislature being constitutionally allowed to regulate a social media company as a common carrier and a federal agency choosing to regulate an entity as a common carrier despite a lack of congressional delegation of authority to do so. Justice Thomas focuses on the former, noting that "[t]he similarities between some digital platforms and common carriers or places of public accommodation may give legislators strong arguments for similarly regulating digital platforms." Believing that an agency can't regulate social media as a common carrier without clear congressional delegation of authority to do so is very much consistent with this view of common carriage.

Conclusion

The major questions doctrine may end up a significant administrative law development as agencies test the bounds of their authorities moving forward. Common carrier regulation of broadband networks will clearly raise many of the issues that give rise to major question cases, and while any future case will largely depend on the facts of the specific regulations in question, any regulation that subjects broadband to Title II classification will undoubtedly face lengthy litigation and the major questions doctrine will almost certainly limit deference to an agency's classification decision. The FCC should carefully consider this eventuality if the agency picks up network neutrality and broadband classification in the future.